

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

7
75-1215

To be argued by

ROBERT GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1215

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO TRABACCHI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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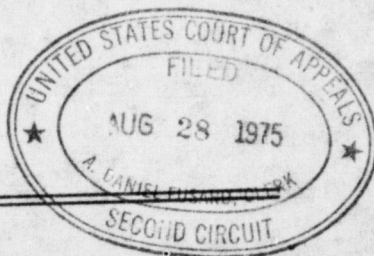


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UNITED STATES OF AMERICA,

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—V.—

ANGELO TRABACCHI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Angelo Trabacchi appeals from a judgment of conviction entered on May 23, 1975 in the United States District Court for the Southern District of New York after a four day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 262, filed March 13, 1975, charged Trabacchi and a co-defendant, Ronald Riccio, in one count with conspiring to deal in narcotics in violation of Title 21, United States Code, Sections 173 and 174 and Sections 812, 841(a)(1) and (b)(1)(A).*

* On October 17, 1973 Indictment 73 Cr. 970 was filed charging Angelo Trabacchi, Robert Maher, Eligio Matos, and Charles Dancil with conspiring to violate Title 21, United States Code, Sections 173 and 174 and Sections 812, 841(a)(1) and

[Footnote continued on following page]

Trial commenced on April 14, 1975, and on April 17, 1975 the jury convicted Trabacchi and acquitted Riccio. On May 23, 1975 Judge Pollack sentenced Trabacchi to an eight year term of imprisonment to be followed by a special parole term of three years. Trabacchi is presently serving his sentence.

Statement of Facts

A. The Government's Case

Albert Rossi testified that following his discharge from the United States Marine Corps in 1966 he took a part-time job in his father's butcher shop located at 2240 First Avenue in the East Harlem section of New York City (Tr. 17, 29).^{*} At about that time Rossi came to know the defendant Ronald Riccio who was working at Andy's Pizzeria, located on First Avenue between 115th Street and 116th Street, only a short distance from Rossi's father's butcher shop (Tr. 30, 32).

841(b)(1). In addition, Trabacchi and Maher were charged with substantive violations of the narcotics laws. On November 12, 1973 the trial of defendants Trabacchi and Maher commenced before the Hon. Lloyd F. MacMahon. On November 15, 1973, the jury found Maher guilty of two substantive violations but was unable to reach any verdict as to Trabacchi; accordingly, Judge MacMahon declared a mistrial.

On December 19, 1973 the case was reassigned to the Hon. Charles M. Metzner, U.S.D.J. The re-trial of Trabacchi commenced on October 8, 1974. On October 18, 1974, after several days of deliberation the jury announced its inability to reach a verdict and another mistrial was declared.

On March 13, 1975 Indictment 75 Cr. 262 was filed superseding Indictment 73 Cr. 970.

^{*} "Tr." refers to the trial transcript and "GX" to government exhibits. References to the transcripts of Trabacchi's earlier trials on Indictment 73 Cr. 970 are identified where they first appear.

Rossi testified that in 1969 Riccio told him that he was no longer working at Andy's Pizzeria but had gone to work at Manhattan Beer Distributors for a man named Angelo. Riccio also told him that, in addition to delivering beer, he and Angelo were involved in the narcotics business (Tr. 32).

Rossi testified that some time in 1969 or 1970 Riccio brought Angelo Trabacchi into the butcher shop (Tr. 32). Rossi subsequently told Trabacchi that he wanted to earn some extra money because he wanted to get married and proposed that he deliver narcotics for Trabacchi (Tr. 34). For a period of about six or seven months thereafter he kept urging Trabacchi to let him "make a move" (Tr. 39). In August or September, 1970, Rossi informed Trabacchi that a narcotics dealer by the name of Red DeVico had just been released from prison and would be able to supply Rossi with heroin (Tr. 34, 158). Trabacchi told Rossi to meet him the next day at Trabacchi's store, Manhattan Beer Distributors, located on First Avenue between 109th Street and 110th Street.

The next day, Rossi went to the store and met with Trabacchi. Trabacchi told Rossi that he would introduce Rossi to a man named Fred Wohlfeld whose customers wanted to buy narcotics (Tr. 35-36). Trabacchi explained that Rossi would get 50% of the profit on the sales of any heroin which Rossi obtained (Tr. 36). Trabacchi also told him that he had previously been in the narcotics business with Bobby Addio but the latter had "beaten" him for \$100,000 (Tr. 36). Wohlfeld then entered Manhattan Beer Distributors and Trabacchi explained that Rossi was his new partner and that since Rossi would be obtaining the heroin, Wohlfeld could give the money directly to Rossi (Tr. 37). Wohlfeld gave Rossi his phone number and instructed Rossi to call him that evening (Tr. 37-38). Rossi called and Wohlfeld told Rossi to meet him in front of his

home on Henry Hudson Parkway in the Riverdale section of the Bronx. Rossi followed Wohlfeld's instructions and drove to Wohlfeld's home where Wohlfeld gave Rossi \$11,000 with which to purchase one kilo of heroin. Rossi took the \$11,000 and drove to Harlem to meet his connection, Red DaVico. DaVico told Rossi that \$11,000 was insufficient for a full kilo. Rossi, unable to contact Wohlfeld at either of the telephone numbers which Wohlfeld had given him went to his parents' house at 2097 Narragansett Avenue in the Bronx and put the \$11,000 in a safe and went to sleep (Tr. 29, 38). About 9 A.M. the following morning, the telephone rang. Trabacchi told Rossi "stay there, I will be right up" (Tr. 39). Rossi waited at home until Trabacchi arrived. Trabacchi then told Rossi that Wohlfeld was nervous because Rossi had the \$11,000 from Wohlfeld's customers, Wohlfeld had not heard from Rossi and Rossi had not delivered any heroin to Wohlfeld. Rossi assured Trabacchi that he still had the money, removed the \$11,000 from the safe and gave it to Trabacchi. Trabacchi then left Rossi's home (Tr. 39-40).

Later that day Rossi went to Manhattan Beer Distributors to meet with Wohlfeld and Trabacchi. Wohlfeld told Rossi that he needed heroin for his customers. Rossi told Wohlfeld to raise more money (Tr. 40).

During the next several weeks Wohlfeld, Trabacchi and Rossi attempted to get enough cash together so that Rossi could obtain heroin from Red DaVico (Tr. 46). During this period of time, Trabacchi and Wohlfeld introduced Rossi to an associate of theirs, Charles Brooks. Brooks, too, wanted to obtain heroin from Rossi and Trabacchi (Tr. 48). Wohlfeld assured Brooks that Rossi was Trabacchi's partner and that Brooks could give his customers' money directly to Rossi. Brooks and Wohlfeld then gave Rossi \$16,000 in cash (Tr. 49-50). Rossi first brought the money to his father's butcher shop where he counted it. He then

brought the money to Red DaVico and attempted to buy a kilo of heroin. DaVico, however, had no heroin to sell, so Rossi "went shopping" for some (Tr. 50-51).

Rossi met with a street gang known as the Wolf Pack. Rossi gave two of the gang members \$15,000 in cash and was told to park his car at a gas station on First Avenue between 108th and 109th streets and to leave the doors unlocked. Rossi did so and waited in the hallway of a building directly across the street from the gas station. A short time later, Rossi watched another of the gang members place a bag under the front seat of his parked car (Tr. 51-54). Rossi then returned to his car, drove to a gas station and called Wohlfeld. Wohlfeld told Rossi to meet him at the White Castle Restaurant on Allerton Avenue in the Bronx. Rossi went there but Wohlfeld did not arrive. Rossi called Wohlfeld again. Wohlfeld told Rossi to come over to his apartment. Rossi met Wohlfeld outside the latter's apartment. Rossi gave Wohlfeld the package of heroin and saw Wohlfeld put it in the trunk of his car. Wohlfeld told Rossi that he would receive the balance of the money owed to him for his efforts the next day after Wohlfeld distributed the heroin to his customers (Tr. 54-55).

The following day Rossi received another phone call from Trabacchi. Trabacchi told Rossi that Wohlfeld had called claiming there was a problem with the heroin which Rossi had obtained for him. Trabacchi instructed Rossi to come to the store (Tr. 55-56). Rossi went to Manhattan Beer Distributors and met with Trabacchi and Wohlfeld, who brought the package containing the heroin which Rossi had given to him the day before. Wohlfeld claimed the heroin was "nothing" and that Rossi had been "beaten" (Tr. 56-57).

Rossi took a sample from Wohlfeld's package, placed it in a dollar bill and left the store to have the sample tested. Later he returned to the store and told Trabacchi and Wohl-

feld that the heroin which he had obtained from the Wolf-pack was of low purity (Tr. 57-60).

Trabacchi told Rossi and Wohlfeld that he was going to borrow \$9,000 or \$10,000 which Wohlfeld, in turn, could return to his customers. Wohlfeld agreed. (Tr. 61-62).

Rossi did not see Trabacchi again until sometime during the Winter of 1971 when they met at the Lemon Tree Bar in the Bronx. Trabacchi told Rossi that he had heard that Rossi and Wohlfeld had been doing narcotics business behind his back and claimed that Rossi owed him a share of the profits of such business (Tr. 63). Several weeks later, by pre-arrangement, Rossi and Trabacchi met in the vicinity of the Ebb Tide Bar in the Bronx. Rossi sold Trabacchi two kilos of heroin for approximately \$50,000. This time, however, Trabacchi tested the heroin with a thermometer (Tr. 63-67). Rossi testified that his profit on this transaction was only about \$2,000 because he wanted to help Trabacchi cover some of the losses for the Wolfpack transaction (Tr. 157).

Andrew DePasquale testified that he and his partner, Raymond Antonelli, participated in two heroin transactions with Trabacchi during the Summer of 1970. DePasquale recalled that around the time of the Feast of Mt. Carmel he and Antonelli walked to Manhattan Beer Distributors and entered the store. DePasquale saw Antonelli remove a package from inside the waistband of his trousers and hand it to Trabacchi in exchange for some cash. DePasquale heard Trabacchi tell Antonelli that he would contact him again (Tr. 202-203).

About two weeks later, DePasquale and Antonelli again met with Trabacchi at the latter's store. Trabacchi told Antonelli that he wanted "the same thing he got before". Antonelli told Trabacchi that he would return a short time

later. DePasquale and Antonelli walked to an apartment on Pleasant Avenue between 118th and 119th streets where Antonelli kept his "stash" of heroin. Inside the apartment, DePasquale saw Antonelli prepare a package of four ounces of heroin which he wrapped in a plastic bag, sealed with a sealing machine and placed inside his pants. DePasquale and Antonelli walked back to Trabacchi's store and Antonelli handed the package of heroin to Trabacchi. Trabacchi took the package, placed it in a soda machine, handed Antonelli some money and said that he would be in touch with Antonelli again (Tr. 204-205).

Raymond Antonelli testified that he had participated in four heroin transactions with Trabacchi. On two occasions he sold Trabacchi four ounces of heroin for \$2,500 in cash (Tr. 245-251). About a week or two after the second sale, Antonelli met with Trabacchi at Manhattan Beer Distributors. Antonelli had no heroin with which to supply his own customers and asked Trabacchi to sell him some. Trabacchi agreed and instructed Antonelli to follow him to New Jersey. Antonelli followed Trabacchi's green Oldsmobile over the George Washington Bridge to a place unfamiliar to Antonelli. He and Trabacchi parked their cars near some row houses and Trabacchi told him to wait. After ten or fifteen minutes Trabacchi returned and gave him a package containing four ounces of heroin for which Antonelli paid \$2,500 cash (Tr. 251-253).

About a week or two later, Trabacchi told Antonelli that he wanted to buy another four ounces of heroin but that he only had about \$700 to give Antonelli as a down payment. Antonelli delivered four ounces of heroin to Trabacchi but Trabacchi, contrary to his promise, never paid Antonelli the balance of \$1,800 (Tr. 254-255).

Doris Torres Olivero testified that in February 1967 she met and subsequently began living with Santiago Olivero,

whose name she assumed (Tr. 354-55). Both were heroin addicts and were engaged in selling narcotics. On one occasion during the winter of 1968 they drove to Manhattan Beer Distributors where Santiago got out of the car and met with Trabacchi. Trabacchi and Santiago entered Manhattan Beer Distributors together. A short time later Santiago returned to the car and told Doris that they would have to return in half an hour. When they returned, Trabacchi and Santiago again entered Manhattan Beer Distributors and a short time later Santiago came out of the store carrying a case of beer which he placed in the trunk of his car. He and Doris then drove to Brooklyn where Santiago removed the case of beer from the trunk and took it upstairs to their apartment. Santiago and Doris then tested the heroin which they had obtained from Trabacchi by injecting it into their own veins (Tr. 357-59).

Doris and Santiago Olivero returned to Manhattan Beer Distributors about two weeks later and Santiago introduced Doris to Trabacchi. They made a total of five or six more trips to Manhattan Beer Distributors. Following the procedure established on their first trip, each time Santiago came out of Trabacchi's store carrying a case of beer containing a kilogram of heroin, drove to their Brooklyn apartment with it in the trunk and weighed and tested it. Doris Olivero also testified that each time Santiago brought \$12,000 or \$13,000 in cash to pay Trabacchi for the heroin (Tr. 364-66).

Retired New York Police Department Detective Sergeant Edward F. Twohill testified that during the Winter of 1972 he had been assigned to the Drug Enforcement Administration Joint Task Force and was conducting surveillance in the vicinity of Manhattan Beer Distributors (Tr. 403-404). Twohill testified that on February 3, 1972 at approximately 10:10 A.M. he saw Trabacchi enter the store. Twohill then

observed Fred Wohlfeld enter the store at about 11:20 A.M. and leave about five minutes later (Tr. 405-406). On February 15, 1972 Twohill again observed Wohlfeld enter Trabacchi's store and leave about five minutes later carrying a beer case which he placed in the trunk of his car (Tr. 407-408). On February 16, 1972 Twohill observed Trabacchi leave the store and return a short time later driving a beer truck. Less than thirty minutes later Wohlfeld arrived, entered the store and left carrying a case of beer which he placed in the trunk of his car (Tr. 408-409). Twohill also testified that on January 26, 1972 he observed Charles Brooks enter Trabacchi's store (Tr. 409-410).

B. The Defense Case

Angelo Trabacchi did not testify or present any evidence in his own behalf.

ARGUMENT

POINT I

Judge MacMahon did not abuse his discretion in declaring a mistrial after the jury announced it was unable to reach a verdict.

Trabacchi contends that the improper declaration of a mistrial by Judge MacMahon at his first trial now requires the reversal of his conviction on the ground that any subsequent prosecution infringed his Fifth Amendment right not to "twice be put in jeopardy." However, Judge MacMahon, as the trial judge, was best situated to intelligently decide if "manifest necessity" dictated a mistrial, *Gori v. United States*, 367 U.S. 365, 368 (1961); *United States v. Goldstein*, 479 F.2d 1066, 1068 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973), and Judge MacMahon's exercise of his broad discretion to declare a mistrial, *Illinois v. Somer-*

ville, 410 U.S. 458 (1973), is reviewable only for abuse of discretion. *United States v. Beckerman*, Dkt. No. 74-2478 (2d Cir. May 13, 1975); *United States v. Goldstein*, *supra*, at 1078; *United States v. Castellanos*, 478 F.2d 749, 751 (2d Cir. 1973). Trabacchi has failed to demonstrate, as he must, that Judge MacMahon's declaration of a mistrial without objection by defense counsel after the jury had indicated its inability to reach a verdict constituted an abuse of discretion. *Illinois v. Somerville*, *supra*, at 461-2; *United States v. Beckerman*, *supra*, *United States v. Goldstein*, *supra* at 1068.

The trial of Indictment 73 Cr. 970 commenced on November 12, 1973, and the case was submitted to the jury at 12:47 in the afternoon of November 15, 1973 (Tr. I. 567).^{*} At 3:10 P.M. the jury sent a note to the Court announcing that it was "tied up" on Count One and inquiring whether it would be appropriate to consider the other counts. It also requested clarification of an evidentiary matter (Tr. II. 568-70). At 4:40 P.M. the jury convicted the co-defendant, Robert Maher, on Counts Four and Five. The foreman then announced that the jury was unable to reach a verdict on Counts One, Two and Three (the counts charging Trabacchi) (Tr. I. 571).

Trabacchi contends that Judge MacMahon abused his discretion by declaring a mistrial without any indication that the jury was deadlocked and without the consent of defense counsel. However, the facts of record indicate precisely the **contrary**.

After four hours of deliberation and an earlier note indicating that it was unable to decide at least one count, the jury unequivocally indicated its inability to reach a verdict on the three counts in which Trabacchi was charged although it had found Trabacchi's co-defendant guilty of two

^{*} "Tr. I." refers to the first trial of Indictment 73 Cr. 970.

substantive narcotics charges. The issues were unusually simple and were submitted to the jury after a very short trial. Under these circumstances, Judge MacMahon did not abuse his discretion by declaring a mistrial. *United States v. Beckerman, supra*; *United States v. Goldstein, supra*, 479 F.2d at 1069; *United States v. Cording*, 290 F.2d 392 (2d Cir. 1961).

Moreover, Trabacchi failed to object to or oppose in any way the Court's declaration of a mistrial. He now attempts to excuse this failure by asserting that his counsel did not have an opportunity to interpose an objection prior to Judge MacMahon's decision to dismiss the jury. It must be noted at the outset, however, that "the court's declaration of a mistrial . . . made without the appellant's active or express consent, does not impair the validity of the ruling." *United States v. Beckerman, supra*, slip op. at 3514; *Gori v. United States, supra*, 367 U.S. at 368. Furthermore, Trabacchi's consent to the mistrial may "be implied from the totality of circumstances attendant on the declaration of mistrial," *United States v. Goldstein, supra* at 1067. Here, not only was defense counsel silent on the prospect of a mistrial but remained silent on the issue even after the declaration of the mistrial when he moved to reduce Trabacchi's bail (Tr. I. 572-74), at which time there was clearly ample opportunity to interpose an objection. Indeed, Trabacchi did not even raise the issue of double jeopardy prior to his retrial on Indictment 73 Cr. 970 before Judge Metzner. The conclusion is inescapable that, perhaps fearing that a jury which had already convicted his co-defendant might well convict him, Trabacchi was quite content at the time to accept Judge MacMahon's decision to declare a mistrial. Cf. *United States v. Beckerman, supra*, slip op. at 3515. Under these circumstances, Trabacchi has fallen far short of establishing the abuse of discretion required to obtain an exemption from a jury determination of the charges against him.

POINT II

The claim of prejudicial pre-indictment delay is frivolous.

Trabacchi also argues that the indictment herein should be dismissed on the ground that the interval between the acts charged in Indictment 73 Cr. 970 and the date of the filing of the indictment constituted prejudicial pre-indictment delay.* This contention was rejected without a hearing by Judges MacMahon and Metzner, who presided over the first and second trials, respectively, of Indictment 73 Cr. 970 (Tr. I. 18; Tr. II. 1-4),** and is contrary to both the applicable law and the facts of this case.

In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court held that the Due Process Clause of the Fifth Amendment protects a defendant against pre-indictment delay only if he can establish that the delay substantially prejudiced his right to a fair trial *and* resulted from prosecutorial misconduct designed to harass or to gain some tactical advantage over him. 404 U. S. at 324-25; *United States v. Brown*, 511 F.2d 920, 922 (2d Cir. 1975).

Trabacchi has totally failed to meet the burden of demonstrating either substantial prejudice or prosecutorial misconduct. Indeed, Trabacchi has never claimed, let alone established, prosecutorial misconduct, as required by *Marion*. His sole claim is that he has suffered substantial prejudice because prior to trial a former employee, Anthony Santana, died at some unspecified time. Trabacchi

* Count One of Indictment 73 Cr. 970 charged a conspiracy continuing up to January, 1973. The latest overt act charged was in November, 1971. The conspiracy period charged in the instant indictment is identical to that in 73 Cr. 970.

** "Tr. II." refers to the second trial of Indictment 73 Cr. 970.

advances, through his counsel, the obviously speculative and self-serving claim that had Santana been available to testify he would have contradicted the testimony of Doris Olivero. Such an assertion raises at most a remote possibility of prejudice. Clearly, Trabacchi has not demonstrated, as he must, any actual prejudice. Cf. *United States v. Stein*, 456 F.2d 844 (2d Cir. 1972); *United States v. Fasanaro*, 471 F.2d 717 (2d Cir. 1973); *United States v. Infanti*, 474 F.2d 522 (2d Cir. 1973). Moreover, any hypothesized prejudice could hardly be considered "substantial," as required by *Marion*, given the highly inculpatory testimony of Rossi, DePasquale and Antonelli. Indeed, the artificiality of Trabacchi's claim is apparent from the fact that in his original pre-indictment delay motion filed prior to the first trial of Indictment 73 Cr. 970 he did not even mention the unavailability of Santana (A. 114-117).*

It is also clear that, in addition to the lack of prejudice, there was no unreasonable pre-indictment delay. The record conclusively establishes that the investigation into Trabacchi's narcotics trafficking activities continued into 1972 (Tr. 403-412). Thus, the delay about which Trabacchi now complains was more illusory than real and was attributable solely to legitimate law enforcement considerations. See *United States v. DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971); *United States v. Feinberg*, 383 F.2d 60 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). Cf. *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

* "A." refers to appellant's appendix.

POINT III

Appellant's claim of various prosecutorial improprieties is without merit.

The Miller Tape

Trabacchi contends that he was deprived of a fair trial by the refusal of the Government to make available to him a certain tape recording of a conversation between accomplice witnesses DePasquale and Antonelli and Richard Miller, an Assistant District Attorney in the office of Special State Narcotics Prosecutor Frank Rogers. At a prior trial, the tape was turned over to Judge Metzner *in camera*. After listening to the tape in its entirety, Judge Metzner ruled that inasmuch as it did not constitute either *Brady* material or Jencks Act material, Trabacchi had no right to listen to it. At the trial of the instant Indictment Trabacchi renewed his application to listen to the tape. Judge Pollack summarily denied the application on the basis of Judge Metzner's previous determination (Tr. 13).

The Government fully met its Jencks Act and *Brady* obligations by making the disputed tape recording available to the Court for an *in camera* evaluation. *United States v. Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert denied*, 419 U.S. 826 (1974). In the absence of a showing of an abuse of discretion, Judge Metzner's determination should be upheld on appeal. *United States v. Pacelli*, *supra* at 1118; *United States v. Catalano*, 491 F.2d 268, 274 (2d Cir. 1974). Trabacchi has totally failed to make such a demonstration.

The Cappucelli Notes

Trabacchi also claims that he was deprived of a fair trial before Judge Metzner or Indictment 73 Cr. 970 by reason of the Government's failure to turn over certain handwritten notes of a co-operating accomplice, Raymond

Antonelli, which were made available to the defense at Trabacchi's subsequent trial before Judge Pollack in which he was ultimately convicted.

The notes to which Trabacchi presumably refers were made by Antonelli in conjunction with the prosecution of Joseph Cappucelli and fifteen other defendants by the Newark Office of the Organized Crime Strike Force on charges of violating the federal narcotics laws (Tr. 333-334). Antonelli's notes catalogued his narcotics activities with the *Cappucelli* defendants and did not refer in any way to Trabacchi or to any of the transactions or other persons involved in this case. Moreover, the notes did not tend to exculpate Trabacchi in any way nor were the notes inconsistent with any of Antonelli's testimony at Trabacchi's second and third trials. Out of an excess of caution and in an effort to foreclose any appellate issue on the subject, Antonelli's notes were turned over to Trabacchi's counsel during the trial before Judge Pollack and defense counsel attempted to make use of the notes in cross-examining Antonelli. In retrospect, however, it is clear that such notes were of negligible utility to Trabacchi's cause.

Thus, the logic of Trabacchi's claim of prejudice is particularly elusive. Even assuming *arguendo* that Trabacchi was entitled to make use of Antonelli's notes at the trial before Judge Metzner, the Government's failure to have turned over such notes would at most have enabled Trabacchi to obtain a new trial at which he would be able to make use of the notes. But this is exactly what occurred as a result of the mistrial declared by Judge Metzner. At the subsequent trial before Judge Pollack, Trabacchi received a copy of the notes (GX 3582), made use of them on cross-examination and was found guilty by the jury (Tr. 298, 303-307, 322-327).

The Prosecutor's Summation

Trabacchi also contends that the prosecutor made certain improper remarks in the course of summation and thus deprived him of a fair trial. The contention is groundless.

Indeed, the claims advanced here were asserted at trial when Trabacchi moved for a mistrial following the Government's summation. Contrary to Trabacchi's claim that the Government's summation was inflammatory and unfair, Judge Pollack denied Trabacchi's motion, stating (Tr. 480):

"In my judgment, as the judge sitting during the trial and appraising the evidence, I think that the summation was restrained, dignified and did not exceed the evidence or the fair intendments and inferences to be drawn from the evidence."

The remarks made in the course of the summation when placed, as they must be, in the context of the trial, *United States v. Bivona*, 487 F.2d 443, 447 (2d Cir. 1973), were clearly within the sanctioned "give and take" of summation. Cf. *United States v. Santana*, 485 F.2d 365, 371 (2d Cir. 1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

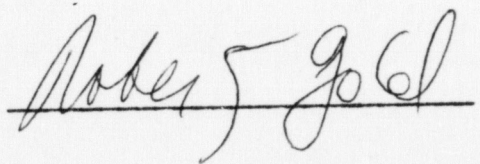
State of New York)
County of New York)

ROBERT GOLD being duly sworn
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

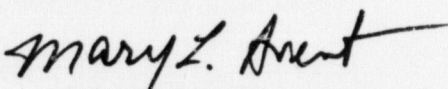
Stating also that on the 28th day of August
he served a copy of the within Appellate Brief for U.S. of America
by placing the same in a properly postpaid franked envelope
addressed:

Jerald Rosenthal, Esq.
11 Park Place
New York, New York

And deponent further says that he sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Courthouse, Foley Square, Borough of Manhattan, City
of New York



Sworn to me before this
28th day of August, 1975.


MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977

